

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

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|--|---|--------------------|
| <b>DIANA L. CAMDEN</b>                 | ) |                    |
| Claimant                               | ) |                    |
| VS.                                    | ) |                    |
|  | ) |                    |
| <b>WAL-MART WAREHOUSE #6035</b>        | ) | Docket No. 264,641 |
| Respondent                             | ) |                    |
| AND                                    | ) |                    |
|  | ) |                    |
| <b>AMERICAN HOME ASSURANCE COMPANY</b> | ) |                    |
| Insurance Carrier                      | ) |                    |

**ORDER**

Claimant appeals the November 7, 2002 Award of Administrative Law Judge Julie A. N. Sample. Claimant was awarded a 5 percent whole body functional impairment, followed by a 15 percent permanent partial general disability, after the Administrative Law Judge found that claimant had proven a wage loss of 30 percent, but no task loss.

Claimant argues entitlement to a 30.45 percent loss of wages and a 72.33 percent loss of tasks, for a 51.39 percent permanent partial general disability. Claimant further argues she sustained an 11 percent whole body functional impairment. Respondent, on the other hand, contends claimant has failed to prove wage or task loss and should also be denied any functional impairment for the injuries alleged on August 2, 2000. The Appeals Board (Board) heard oral argument on May 6, 2003. Gary M. Peterson was appointed as Board Member Pro Tem for the purposes of this appeal.

**APPEARANCES**

Claimant appeared by her attorney, Daniel L. Smith of Overland Park, Kansas. Respondent and its insurance carrier appeared by their attorney, James B. Biggs of Topeka, Kansas.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopts the stipulations listed in the Award.

### ISSUES

Claimant requests review of the nature and extent of disability as well as the medical expenses incurred. Claimant contends she has suffered an 11 percent functional impairment and a 51.39 percent work disability based on Dr. Bieri's rating. Claimant also argues she was referred by Dr. MacMillan, the authorized treating physician, to her primary care physician, Ellen Sinclair, M.D., and, therefore, the medical expenses of Dr. Sinclair and her referrals should be paid as authorized medical treatment.

Respondent argues the Administrative Law Judge's award should be modified to provide a zero percent functional impairment and a zero percent work disability based on Dr. MacMillan's ratings and claimant's lack of a good faith effort to obtain employment. Respondent further argues that Dr. MacMillan only advised claimant to see her family physician, rather than actually referring claimant to her family physician.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein and the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant suffered accidental injury on August 2, 2000, when, while reaching for a box, claimant lost her balance, falling backwards into shelves. She struck her tailbone and low back. Claimant reported the injury and missed the remainder of the work week. Claimant was treated at respondent's occupational health facility by Charles Smith, M.D., who returned claimant to light duty, restricting her from lifting in excess of 5 to 10 pounds and prohibited bending and pushing. Claimant was also prescribed medication for her pain and referred to physical therapy. Claimant was referred to Don B. Miskew, M.D., for additional treatment in October of 2000. Respondent maintained claimant on light duty for approximately 90 days after the accident, until roughly November 20, 2000.

Thereafter, respondent was unable to accommodate claimant's restrictions, and claimant was placed on temporary total disability compensation for 13 weeks. Claimant testified that after receiving temporary total disability, she believed she was on call with respondent, subject to a return to work. Her job search during this period through August 2001 was limited. Beginning in August 2001, however, claimant substantially increased her job search efforts until January 7, 2002, when she obtained employment at Ransom Memorial Hospital. At the time of the regular hearing, claimant was employed in the dietary department as a caterer. As of May 18, 2002, claimant was earning \$8.62 per hour, but working less than 40 hours a week on a regular basis. The Administrative Law Judge found claimant to be regularly working 37 to 38 hours per week, which computes to a wage of \$329.63, which, when compared to her pre-accident wage of \$474, resulted in a 30 percent wage loss. These computations were not disputed by the parties.

Respondent does, however, contend that claimant failed to make a good faith job search effort and believes she is capable of earning a comparable wage and should, therefore, be denied any work disability.

In January 2001, claimant was referred to Jeffrey T. MacMillan, M.D., a board certified orthopedic surgeon, for treatment. At the time of the first examination on January 30, 2001, claimant was complaining of low back pain, with a pulling sensation in her mid back. Dr. MacMillan found claimant's neurological examination to be normal. Claimant was referred for a lumbar MRI, which was also reported as normal. During his deposition, Dr. MacMillan asked whether he had referred claimant to her family physician for treatment of a work-related injury. He responded:

I told her she should be evaluated by her family doc to make sure she didn't have a non-spine-related source of injury, but I'm not a gate keeper, so I don't have the right or the obligation, like an HMO, to send people to some other doctor for evaluation or treatment.<sup>1</sup>

Claimant testified that, in her opinion, this constituted a referral by Dr. MacMillan, the authorized treating physician, to her family doctor. Claimant alleges the series of treatments provided thereafter should constitute authorized medical treatment. Respondent contends these treatments were unauthorized and respondent's liability should be limited by the unauthorized statutory amount of \$500, pursuant to K.S.A. 44-510h(b). There was no referral by Dr. MacMillan to claimant's family doctor for treatment of her work-related injuries.

Claimant was evaluated at the request of her attorney by Peter V. Bieri, M.D., board certified as a disability evaluating physician. Dr. Bieri observed muscle spasms in claimant's lumbar spine, assessing her an 11 percent permanent partial impairment to the body as a whole pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). Dr. Bieri testified that he utilized the AMA *Guides* (4th ed.) range of motion model in reaching this opinion. He placed restrictions on claimant, including occasional lifting to 30 pounds, frequent lifting to 15 pounds and constant lifting to 10 pounds.

Claimant provided a list of nine jobs, which she described as covering her 15-year work history prior to the date of accident. Dr. Bieri concluded that claimant had the ability to perform only two of those nine jobs, which resulted in a 78 percent task loss. The job list provided to Dr. Bieri did break those jobs down into individual tasks, but Dr. Bieri was never questioned specifically about the tasks associated with each job. He confined his testimony to a discussion of the jobs, rather than the tasks associated with those jobs.

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<sup>1</sup> MacMillan Depo. at 9.

Due to the dispute between Dr. Bieri's 11 percent functional impairment and Dr. MacMillan's zero percent functional impairment, claimant was referred to Theodore L. Sandow, Jr., M.D., by the court for an independent medical examination. Dr. Sandow found claimant to have full forward flexion, with mild restrictions as to the extension of the lumbar spine. He did find tenderness of the L4 and L5 spinous processes, along with some tenderness over the right sacroiliac joint. The x-rays reviewed by Dr. Sandow indicated a normal spine, with no significant degenerative changes, congenital abnormalities or spondylolisthesis. He assessed claimant a 5 percent whole person impairment based upon the *AMA Guides* (4th ed.) and suggested claimant limit her permanent restrictions to no repetitive bending, twisting or lifting in excess of 40 pounds.

Claimant alleges entitlement to a work disability in excess of her functional impairment based upon K.S.A. 44-510e, which states:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

Respondent referred claimant to Mary Titterington, a vocational specialist, for the purpose of evaluating claimant's loss of task performing abilities. Dr. MacMillan was asked to review the task list provided by Ms. Titterington. Dr. MacMillan opined that claimant was capable of performing all of the job tasks listed by Ms. Titterington. This conclusion was reached after Dr. MacMillan was requested to review a surveillance videotape provided by respondent. That videotape showed claimant, on February 10, 2001, carrying boxes and other items to her residence from a pickup truck. After Dr. MacMillan observed the videotape, he opined that claimant's limitations were less than he had originally thought and that she was physically capable of returning to any of the job tasks displayed on Ms. Titterington's list and performing those tasks without risk.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to the benefits requested by a preponderance of the credible evidence.<sup>2</sup> Claimant argues that she has a functional impairment of 11 percent based upon the opinion of Dr. Bieri. However, the Administrative Law Judge adopted the findings of the independent medical examiner, Dr. Sandow, as the most persuasive. The Board, in reviewing the evidence, confirms that Dr. Sandow's opinion appears to be the most credible and awards claimant a 5 percent whole person permanent partial functional impairment, thereby affirming the award of the Administrative Law Judge in this regard.

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<sup>2</sup> K.S.A. 44-501 and K.S.A. 44-508(g).

Claimant next contends she is entitled to a substantial work disability based upon K.S.A. 44-510e. The statute obligates that the fact finder compare both a claimant's wage and task loss as they relate to the claimant's alleged injuries. In considering claimant's allegations of a task loss, the Board finds the opinion of Dr. MacMillan to be the most persuasive. Dr. MacMillan, after reviewing the videotape, found claimant had suffered no task loss under K.S.A. 44-510e. The opinion of Dr. Bieri is found not to be credible, as it does not consider the individual tasks described in claimant's job list. It simply lumps claimant's jobs together, without a specific description or explanation of whether claimant was capable of performing the individual tasks associated with each of those jobs. Therefore, claimant is found to have suffered no loss of task performing abilities under K.S.A. 44-510e.

Claimant also alleges a substantial loss of wage earnings as a result of this injury. The Administrative Law Judge found claimant had failed to put forth a good faith effort in her job search through August 2, 2001. Claimant testified that during that time period, her job search was very limited. However, claimant went on to explain that she thought that she was subject to callback with respondent and, therefore, had intentionally limited her job search. The Board finds this explanation to be credible. In considering the policy set forth in *Copeland*,<sup>3</sup> the Board finds claimant made a good faith effort to find appropriate employment and, therefore, is entitled to a work disability based upon her loss of wages during this period, even though she acknowledged her job search was self-limited for the above reasons.

Claimant testified that she missed the remainder of the week after her date of accident, but then was returned to work at a comparable wage by respondent for approximately 90 days, into November 2000. Claimant was then paid temporary total disability compensation for 13 weeks through February 8, 2001. Thereafter, the Board finds that claimant either put forth a good faith effort to find employment or was justified in her limited search efforts through August 2, 2001. After August 3, 2001, and through January 7, 2002, the Administrative Law Judge found, and the Board concurs, that claimant did put forth a good faith effort in her job search. Therefore, for the period February 9, 2001, through January 6, 2002, claimant is entitled to a 100 percent loss of wages. As of January 7, 2002, claimant obtained employment with a local hospital, earning \$329.63 per week, resulting in a 30 percent wage loss. As claimant has failed to prove a task loss for the period when she was earning zero wages, claimant is entitled to a 50 percent work disability. Beginning January 7, 2002, claimant is entitled to a 15 percent permanent partial general disability.

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<sup>3</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Julie A. N. Sample dated November 7, 2002, should be modified to award claimant a 50 percent permanent partial general disability beginning February 9, 2001, through January 6, 2002, followed thereafter by a 15 percent permanent partial general body disability for a date of accident of August 2, 2000, and based upon an average weekly wage of \$474 per week.

Claimant is entitled to 13 weeks temporary total disability compensation at the stipulated rate of \$316.02 per week totaling \$4,108.26 through February 8, 2001, followed thereafter by 47.43 weeks permanent partial disability compensation at the rate of \$316.02 per week totaling \$14,988.83 for a 50 percent permanent partial general disability for the period February 9, 2001 through January 6, 2002, followed thereafter by 14.82 weeks permanent partial general disability compensation at the rate of \$316.02 per week totaling \$4,683.42 for a 15 percent permanent partial general disability beginning on January 7, 2002, making a total award of \$23,780.51

As of the date of this award, the entire amount is due and owing and ordered paid in one lump sum, minus any amounts previously paid.

In all other regards, the Award of the Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of June 2003.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Daniel L. Smith, Attorney for Claimant  
James B. Biggs, Attorney for Respondent  
Julie A. N. Sample, Administrative Law Judge  
Paula S. Greathouse, Director